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ABSTRACT

In considering written codes of student conduct, it is important to distinguish between discipline and codes of discipline and between legal necessity and educational desirability. Educators remain free to decide about the desirability of diverse disciplinary measures so long as the minimal constitutionally mandated procedures are followed. In fact, a school has the authority to discipline students without written rules, except in Massachusetts, where publication and filing of student conduct regulations is required. The jurisdiction of a school to punish has generally extended to the point where the student's misbehavior has a direct and detrimental tendency to injure the welfare of the other students in the school. Since court cases control much of life today, school administrators who rewrite their discipline policies must be cognizant of constitutional rights and educational law. Discipline codes should provide for fairness, fact-finding, fullness of information, candor, flexibility, firmness, suitability of punishment to offense, compatability of student and school interests, feasible implementation, the least restrictive approach necessary, and good faith in proceedings. However, a discipline code is but one critical element in a school's discipline program. Fair administration of the rules, written and unwritten, is a far more important ingredient. (Author/WD)

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A Legal Memorandum

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STUDENT DISCIPLINE CODES:
Developments, Dimensions, Directions

Written codes of student conduct are a fairly recent phenomenon. Their appearance on the school scene coincides with the rash of student rights cases that flooded the federal courts in the late '60s and early '70s. This short history does not, however, suggest a scarcity of issues surrounding the codes. Corporal punishment, hair and dress regulations, suspension and expulsion are as controversial and unsettled as ever after years of litigation. While these issues still constitute the central components of any code, how they get resolved is more a question for educators than lawyers or judges.

It is important at the onset to make two distinctions: one, between discipline and codes of discipline; and two, between legal necessity and educational desirability.

What is legally necessary may not be educationally desirable; whereas what is educationally desirable may not be legally necessary. This distinction is often blurred and confused. While there is much debate concerning the educational desirability of corporal punishment, there is no question about its legality. The constitutionality of corporal punishment was affirmed by the U.S. Supreme Court in Ingraham v. Wright, 430 U.S. 651 (1977).

Educators remain free to make their special educational decisions about the desirability of diverse disciplinary devices. So long as the minimal (and few) constitutionally (and statutorily) mandated procedures are followed, the substance of disciplinary policy is wide open. It is a fallacy to think that the courts have taken away disciplinary discretion. Only when constitutional rights are implicated, and when educators abdicate their legal (as distinguished from educational) responsibility, are the courts compelled to act. The reluctance and restraint with which courts intrude into the academic realm is cited in every major decision involving education.

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Discipline and Disciplinary Codes

The distinction between discipline and codes of discipline is often not fully appreciated. Schools have always had (or lacked) discipline. Administrators, acting in loco parentis or pursuant to state enabling statutes, possessed sufficient authority to discipline disruptive, disobedient, or disrespectful students. What constituted disruption or disobedience or disrespectfulness was left to the sole, if not also sound, discretion of those entrusted with the maintenance of the schools and management of the students. There was no legal requirement that there be written rules.

As late as 1970, a Massachusetts District Court judge (the same one to become intimately involved in the lengthy and still ongoing Boston desegregation suit) held that students could be punished and excluded from athletic participation for coming to a school dance with beer on their breaths even though there was no prior published rule prohibiting such behavior. Hasson v. Boothby, 318 F. Supp. 1183, 1187 (D. Mass., Garrity, J.) The court recognized the "desirability" of written rules, but affirmed school authority to discipline student offenders without them. Discipline depended upon the students' knowledge of the wrongfulness of his conduct, the clarity of the public purpose served, the potential for chilling effect on constitutionally protected activities, and the severity of the penalty imposed.

In 1972, however, the Massachusetts legislature approved a state law requiring its school committees to publish and file with the Education Commissioner their rules and regulations pertaining to student conduct. (St. 1972, c. 467, M.G.L., c. 71 § 37 H.) Unpublished and unfiled rules no longer have legal effect in Massachusetts; but the mere publication and filing do not necessarily make the rules legally effective. The disciplinary rules themselves must still be constitutionally and statutorily valid. That is, they must meet the test of reasonableness and must serve a legitimate school-related function.

Proper Scope of Student Disciplinary Rules

The actual writing of the rules was never the true test of the teacher's or school's control over pupils. The jurisdiction of a school to punish a student has generally extended to the point where the student's misbehavior had a direct and detrimental tendency to injure the welfare and well-being of the other students in the school. This rationale even justified the exclusion of a minor female for engaging in a continued course of open and notorious familiarities and actual illicit intercourse with a man outside the school and not during school hours. Sherman v. Inhabitants of Charlestown, 62 Mass. (8 Cush) 160 (1851), in order to protect the purity of the school and the other students from injurious influence.

Nor did the absence of written rules preclude the corporal punishment or personal chastisement by a teacher of a student who was habitually refractory and disobedient. Sheehan v. Sturges, 53 Conn. 481 (1885), or the corporal punishment of a student for frequently assaulting, annoying, and abusing small girls on their way home from school after school hours. O'Rourke v. Walker, 102 Conn. 130 (1925).

Such out-of-school conduct had a direct and immediate tendency to adversely affect school conduct, operations, and usefulness and was properly punishable without prior published rules.

In the late 1960s and early 1970s, however, school board authority over students began to be called into question. Constitutional challenges, as reflected in Tinker v. Des Moines Independent Community School District, 398 U.S. 503 (1969) and in the numerous hair and dress cases tested the limits of disciplinary decision-making.

Issues of procedural due process increasingly came before the courts, and culminated with the Supreme Court's decision in Goss v. Lopez, 419 U.S. 565 (1975) setting constitutional standards for suspending students. The schools' response was to redefine and redraft their old and outdated student handbooks into codes of student discipline.

In the past, student handbooks listed what few rules the schools had. These rules were sparse, vague, overly broad and general. They left so much room for administrative interpretation and discretion that the school official alone determined what constituted a violation and what penalty was to be imposed. The student handbook served the administrator's purpose of being the authority to cite and support disciplinary action, but gave little, if any, guidance to students in defining what (mis)conduct was prohibited and punishable.

Drafting a Code of Discipline: The Eleven F's

In our litigious age, court cases control much of life. This is especially true in the field of school discipline where court decisions dictate and define the dimensions and directions of discipline codes. School administrators who undertake to rewrite their disciplinary policies must be cognizant of constitutional considerations and schooled in education law. To be sure, student rights must be respected. But because the constitutional requirements are "rudimentary," there is much lawful leeway in the drafting of discipline codes. Guided by the constitutional requirements, school administrators can do much to eliminate the ambiguity and arbitrariness that have been associated with school discipline in the past.

Fairness

The first and foremost factor in any discipline code (and in the imposition of discipline) is fairness. Goss v. Lopez requires school officials to "follow fundamentally fair procedures to determine whether the misconduct has occurred" and to avoid "unfair or mistaken exclusion from the educational process." Fairness is required not only in the procedures of notice and a hearing prior to disciplinary exclusions, but also in the penalties to be imposed. Code provisions, procedures, and penalties should be strictly scrutinized for their fairness. Fairness means impartiality, reasonableness, even-handedness, and nondiscrimination.

The code should provide that the administrator holding the hearing and imposing the disciplinary sanction shall be impartial and free from bias. Witnessing

the conduct forming the basis of the charge does not necessarily disqualify the disciplinarian from deciding the case. But he should be clear and certain that he is making an objective disciplinary decision based on the facts of the case and not just on his feelings toward the student.

Fact-Finding

This brings us to the second critical dimension of codes of discipline—fact-finding. The discipline code should provide for a fact-finding procedure whereby the administrator conducts whatever investigation he deems necessary to ferret out the facts and make sense of disputed evidence and explanations. He should hear both sides of the story, speak to the witnesses and participants, and then make an informed decision based on the results of his investigation. The fact-finding process need not be lengthy or overly involved as in the taking of sworn statements. The nature, extent, and timing will depend upon the situation, the seriousness of the infraction, and number of persons involved.

Full Information

Fullness of information is another characteristic. The code should provide that the student be "fully informed" of the disciplinary charges and given an explanation of the evidence the school officials have against the student. Goss v. Lopez and Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).

The disciplinary charges should be specified in as much detail as possible. Time, place, and manner should be included. Such terms as "misconduct," "horseplay," or "disruption" should be avoided as ambiguous, vague, and meaningless. Soglin v. Kauffman, 418 F. 2d 163 (7th Cir., 1969). Full disclosure and complete documentation should be the norm so that the student is given sufficient information to prepare his defense or explanation in mitigation. The more serious the charges and the more severe the sanction, the more detailed and documented the notice should be. There should be no withholding of information unless there is a bona fide fear of personal safety or retaliation (See DeJesus v. Penberthy, 344 F. Supp. 70 [D.Conn., 1972], Smith v. Milier, 514 P. 2d 377 [Kan. 1973]. Tibbs v. Board of Ed. of the Township of Franklin, 59 N.J. 506, 284 A. 2d 199 [1971].) The code can specify under what circumstances and conditions witnessing students or staff will be compelled to testify and be cross-examined or when fear of physical reprisal, revenge, or retaliation justifies nondisclosure. In some cases what is not disclosed may not be used to support a disciplinary exclusion.

Frankness

Closely related to disclosure is the requirement of frankness. School officials should be open, honest, truthful, candid, and forthright in dealing with and disciplining students. Dishonesty and nondisclosure will only come to haunt administrators. Since students have a federal statutory right to see their school records ("The Family Educational Rights and Privacy Act" 20 U.S.C. § 1232g), and many states have similar statutes, officials may be in for another round of litigation if they deliberately fail to deliver relevant documents. A

code of discipline may even provide for penalties for school officials who fail to abide by the disclosure provisions. Where both students and staff are bound by the terms of the code, there may be greater compliance and respect on the part of all parties.

Flexibility

Flexibility is an important factor in the framing of disciplinary procedures. The Supreme Court in Goss v. Lopez stressed that the very nature of due process negates rigidity and inflexibility—which serve neither the schools' nor the students' interests. No single set of procedures have been judicially mandated and the administrator's flexibility to deal with emergencies and unusual situations remains intact. Codes should incorporate the "flexibility" factor into their procedures so as to provide administrators with the necessary room to respond to the myriad of situations that arise in a school.

Just as the Court in Goss stressed flexibility, the Court took great pains to repeatedly point out the "informality" of the "rudimentary" requirements. The Court refers to the "informal hearing" as an "informal discuss(ion)" and "informal give and take" between the disciplinarian and the student. The Court was concerned with "further formalizing the suspension process and escalating its formality" and specifically ruled out "truncated trial type procedures" for short suspensions of ten days or less.

Firmness

While informality surely promotes positive rapport and relationships between students and administrators, it should not be used as an excuse to circumvent constitutional requirements. This is where the characteristic of firmness comes in. Informality is fine, but discipline should be firm as well; it should not become an excuse for permissiveness. Disciplinary firmness means consistency, evenhandedness, and uniformity of application. Students should know that when they break a reasonable rule they will suffer the consequences. It means that the code is to be taken seriously and that infractions will not be ignored. One of the biggest problems with school discipline today is that too many infractions are ignored or go undisciplined. Too often students who get caught cry "unfairness" because they know of other students who got away with the same offense. Administrators must use great care not to single out students and punish them as examples. But if a code provision is violated and the student is found, after hearing, to have committed the violation, he should be appropriately disciplined. If the code violation is not worth disciplining, it is not worth being in the code in the first place. Undisciplined violations breed disrespect and noncompliance.

Fitness

Codes of discipline should be concerned with disciplinary fitness. That is, the procedures and punishment should be tailored to fit the offender and the offense. Penalty proportionality promotes the overall fairness of the code. As one court put it, the "severity of the punishment...(should be) commensurate with the severity of the acts committed." Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla., 1973). The criminal law principle that punishment should fit the crime (and the criminal) may be appropriately adapted to school discipline.

Major penalties such as long-term suspensions or expulsions should be reserved for major violations and grievous wrongs. This may be one of the most delicate and difficult characteristics to incorporate into a code and an administrator's disciplinary practice. Many administrators desire to keep all disciplinary options open when disciplining a student. While this enhances individualized treatment, it leaves too much to the individual discretion of the disciplinarian. Ranges of penalties for categories of offenses is the best solution, but the determination of the ranges and the placement of the offenses into the categories will surely test the educator's capacity to develop fair disciplinary policies.

Fraternity

The factor of fraternity should be considered in the drafting of discipline codes. Fraternity, or the compatibility, commonality, and coincidence of school and student interests received enthusiastic support in Justice Powell's dissent in Goss v. Lopez. Justice Powell was concerned that constitutionalizing the school disciplinary process would destroy the collegiality and nonadversarial nature of the normal educational relationship between a student and his school. Whatever one's view as to educational effects of the limited procedural protections mandated by the Goss v. Lopez decision, a discipline code should recognize that students, teachers, and administrators have an ongoing relationship that will continue after the fact of suspension.

Feasibility

The feasibility of carrying out code procedures and provisions is an important dimension in terms of implementation. Careful consideration should be given to the practical and operational effects of certain procedures before incorporating them into a code. The Court made clear in Goss that the timing and nature of the informal hearings would depend to some degree upon considerations of practicality, cost, and efficacy. The Court even provided for emergency suspensions where a student's presence poses a continuing danger to persons or property and an ongoing threat of disrupting the academic process in which the necessary notice and rudimentary hearing would follow as soon as "practicable." It makes no sense to impose procedures that cannot be feasibly implemented. Such procedures will be disregarded and will only lead to disrespect for other code provisions as well.

Frugality

A code should contain only that which is necessary to the maintenance of discipline. Frugality does not mean brevity, although verbosity is not favored either. Frugality means the employment of procedures and sanctions only to the extent that school objectives cannot be otherwise accomplished. If a child's misconduct can be cured or corrected with the disciplinary measure short of suspension, then the lesser penalty should be used. The least restrictive alternative approach is consistent with the frugality concept as recommended by the Juvenile Justice Standards Project of the Institute of Judicial Administration and American Bar Association. (Cambridge, Mass.: Ballinger Publishing Co., 1977.)

Faithfulness

This is probably the most important characteristic of discipline and of discipline codes. School officials know that they have a good faith defense to civil rights

actions. Wood v. Strickland, 420 U.S. 308 (1975). But good faith is more than the mere absence of actual malice. Ignorance or disregard of settled, indisputable law and of clearly established constitutional rights are no longer valid excuses. A school official must act with a sincere belief that what he is doing is right and reasonable.

"Good faith" cannot be drafted into a code, but it pervades the entire disciplinary process. The fair-minded and fair-acting administrator has nothing to worry about, legally. Such an administrator does not need a code of discipline to cite, rely,or fall back upon to justify his decisions and actions.

IN CONCLUSION...

It is doubtful that full-fledged discipline codes (as opposed to compliance with constitutional procedures) will be judicially mandated. No court has actually ordered a code of discipline, although some have come terribly close. (See Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 [D.C. Dist. Col., 1972], and General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 [D.C. Missouri 1968].)[1]

Legal mandate and necessity aside, most educators today recognize the educational desirability, if not legal advisability, of codes. Codes enable students (and school staff and the public) to know the disciplinary consequences of misconduct. This is desirable from both a constitutional and pedagogical perspective. And the future will surely see more sophisticated and technically legal documents drafted with the assistance of attorneys.

But school discipline depends more upon personnel (the principal, students, and staff) and educational environment rather than upon any single document. A school with even the most enlightened code may be beset with discipline problems, whereas a school without written rules may be well run and well disciplined.

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[1] In Boston, a code of discipline was developed in 1970 following litigation challenging corporal punishment. New guidelines for implementation were administratively adopted in early 1975 following Goss v. Lopez. Then, in partial response to one aspect of the Boston desegregation suit challenging racial discrimination in disciplinary penalties, a new code was drafted over the spring and summer of 1975 by a committee in which the author served as legal consultant. This 1975 code was enjoined from implementation in September 1975.

The parties to the desegregation then attempted to arrive at an agreed-upon code, but these efforts proved unsuccessful. Even after a year of hearings, and two years after the injunction, when the court would not issue its own code, a superintendents' task force on discipline recommended development of a new code of discipline, as did a 1979 middle schools task force. In the spring of 1979 a new committee began the process of drafting a new code, and in September 1980, this code was finally adopted and put into effect.

Educators should realize that discipline codes alone will not solve the problems of school discipline. A code is but one critical component in the discipline of a school. The fair administration of discipline and of rules, written as well as unwritten, is a far more intangible and important ingredient.

Also, discipline codes are difficult to draft, as anyone who has participated in the development of a code can readily attest. But the drafting process forces educators to come to grips with discipline problems, focuses hard thinking about educational policies, and tests the educational rationality of their positions. For these reasons alone, it is well worth the extensive effort of schools and their administrators to keep at the hard job of re-writing their codes.

This Legal Memorandum was contributed by Arthur H. Goldsmith, Esq., member of the firm of Goldsmith, Little & Guisbond of Boston, Mass.

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